

ESTATE OF JOHN J. AKERS

IBIA 70-9 (Supp.)

Decided March 26, 1975

Decision and Remand with Orders implementing the Judgment of the Ninth Circuit Court and the prior orders of the Board of Indian Appeals.

Order

1. Indian Probate: Secretary's Authority: Jurisdiction of the Courts

The Secretary is bound by the order of a court only as to those issues and as to those individuals before the court.

2. Indian Probate: Secretary's Authority: Jurisdiction of the Courts

Where issues are decided by the Secretary which do not become the subject of

litigation, the Secretary's decision is final as to those issues not litigated.

APPEARANCES: For appellant, Gerald J. Neely of Towe, Neely & Ball, Billings, Montana. For appellee, Hubert J. Massman of Helena, Montana.

OPINION BY ADMINISTRATIVE JUDGE WILSON

This matter is before the Board for the implementation of the judgment in Dolly Cusker Akers v. Rogers C. B. Morton, et al., (CA 9th Cir. No. 71-3002) 499 F.2d 44 (9th Cir. 1974) upon receipt of the communication of March 4, 1975, to the Solicitor, Department of the Interior, from Mr. Herbert Pittle, Assistant Attorney General, Land and Natural Resources Division,

Re: Dolly Cusker Akers v. Rogers C. B. Morton, et al * * * the time for certiorari in the above-entitled action has expired.

Accordingly nothing further remains to be done and this file is being closed.

[1] The Ninth Circuit Court considered only two of the various issues raised in the appeal from the District Court, i.e., (1)

the correctness of the Departmental approval of the testator's will dated December 5, 1957, and (2), the denial of the applicability of the Statutes of Montana creating dower rights in a widow. The Circuit Court affirmed the District Court approval of the Departmental ruling on both. Upon the failure of the widow to pursue appellate procedures the case stands finally decided by the Circuit Court, and the Department is affirmed in its disposition of the two issues raised, supra.

[2] Those issues raised in the course of probate of this estate which have not been before the courts involve the allowance of and priority of payment of two of the four claims filed. No dispute was raised as to the allowance and payment of the probate fee and the claim for irrigation. The allowance of a claim of the Internal Revenue Service against both the widow, Dolly Cusker Akers, and this Estate was finally decided for the Department by this Board in 1 IBIA 246, (79 I.D. 404, 1972). The Internal Revenue claim was authorized to be paid from income only and not from sale of any trust land. In that same decision, a claim against the estate for attorney's fees by Mr. Hubert J. Massman who had represented the devisee as the proponent of the decedent's will was disallowed as not being chargeable against the estate. It was held that he represented his client only in this case, and that his fees were her cost, and not a cost of administration to be paid from estate assets.

The Board's decision of May 24, 1972, supra, was not challenged in the courts and is therefore final for the Department. The Court record shows that on October 5, 1971, Dolly Akers filed an appeal in the Ninth Circuit Court seeking reversal of the District Court's approval of the will and its denial of dower. The appeal was dismissed "* * * for want of prosecution * * *" by order of the Court filed May 3, 1972. The Board's decision was entered May 24, 1972, on the separate issues of the allowance of the claim of Internal Revenue and both the allowance and priority of the claim for attorney's fees on a date when no proceeding was pending in any court. The record further shows that upon appellant's motion of June 15, 1972, the appeal was reinstated by the court on June 29, 1972, and that the issues before the court were finally decided June 20, 1974.

It is the conclusion of this Board that the orders entered in Estate of John J. Akers, Docket 70-9, 1 IBIA 246, 79 I.D. 404 (1972), continued in effect and should be reaffirmed.

NOW, THEREFORE by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2) the decision of the Board 1 IBIA 246, 79 I.D. 404 (1972), in the estate herein shall be, and the same is HEREBY REAFFIRMED, and the Superintendent shall:

A. Distribute all cash funds in the Individual Indian Money account:

1. in payment of the probate fee of \$75; and
2. in payment of the irrigation claim of \$310; and
3. the balance of the fund shall be paid toward satisfaction of the Internal Revenue claim and the Superintendent shall pay any future income accruing to the estate until the debt be satisfied.

B. Deliver to Hazel Trinder, in accordance with the will of John Akers, the trust lands which form the residue of John Akers' estate.

IT IS FURTHER ORDERED, that this matter shall be and the same is HEREBY REMANDED to the Administrative Law Judge having probate jurisdiction at the Fort Peck Reservation with authority to issue any and all orders necessary to implement the judgment of the court and the decisions and orders of this Board.

This decision is final for the Department.

Alexander H. Wilson
Administrative Judge, Member

I concur:

Mitchell J. Sabagh
Administrative Judge, Member